his interest, or that of the wife, may not have pursued the wisest and fairest course. The more we reflect upon the subject, and the further we have examined and considered the rules of law, and the decisions of the court, upon the subject, the more fully we have become reconciled to this view. We can therefore adopt the views of Mr. Justice KENT, so satisfactorily presented, without any misgivings, notwithstanding any impression we might have, that the courts might in the first instance have adopted some middle course, more consistent with principle and analogy, if not as simple and easy of application. I. F. R.

In the Supreme Court of Michigan.

JAMES A. RICE *vs.* JOHN RUDDIMAN.

The rule of riparian proprietorship upon the river Detroit, as laid down in *Lorman* vs. *Benson*, 8 Mich. 18, is applicable to Lake Muskegon; and the ownership of land bordering upon the lake, carries with it the ownership of the land under the water, so far out as it is susceptible of beneficial private use, but subordinate to the paramount public right of navigation, and the other public rights incident thereto.

Error to the Circuit Court for Muskegon County.

Walker & Russell, for plaintiff in error.

G. F. N. Lothrop, for defendant in error.

CHRISTIANCY, J.—The errors assigned, raise the question whether riparian ownership of lands along Muskegon Lake is to be governed by the law applicable to tide-waters, or substantially by the common law rule applicable to fresh-water streams above the ebb and flow of the tide.

The plaintiff below appears to have been the owner of fractional section eighteen, town ten north, range sixteen west, bounded according to the United States survey of the public lands, by the water line of the lake. The section was made fractional by the waters of the lake occupying a part of what would otherwise have fallen within its lines. He had executed a mortgage of this fractional section, which had been foreclosed in the United States Circuit Court for the district of Michigan.

Either about the time of the mortgage or afterwards, and before the foreclosure, he had erected a saw-mill and other buildings in the shallow waters of the lake, about twenty-nine rods from the margin or meandered line of the section, but within the area which but for the water would have been within the lines of the section, and at or a little beyond the point where a sand-bar extending from the land sunk below the water; the depth of the water where the mill was built being about two feet. This sand-bar at the time the mill was built furnished the roadway to or very nearly to the mill, but in subsequent higher stages of the water was covered and a roadway was made of slabs to the land, and the space around the mill, or what is commonly known as the mill-yard, was formed by slabs and refuse stuff from the mill. Along the sides of the bar and about the mill the bottom was a soft and muddy deposit in which grass and rushes grew.

The plaintiff in error (defendant below) justifies the taking of possession and the ejecting of the plaintiff below under a writ of possession issued in the foreclosure suit.

The evidence in the case tended to show (and upon this there appears to have been no dispute), that "Muskegon Lake is about six miles long, with an average width of about two and a half miles;" that "the outlet from it into Lake Michigan is about sixty rods long:" and though the evidence is silent as to the width of the "outlet," yet it is evident from this language, that the lake itself does not extend to Lake Michigan, but that it discharges its waters into the latter through a comparatively narrow passage called an outlet, and that this is about sixty rods long. But "the level of the lake is affected by the level of Lake Michigan, and rises and falls with it." It does not appear by the evidence, whether a distinct river channel (of Muskegon river, which flows into this lake and through it to Lake Michigan) can be traced through the lake. Such are the facts appearing in the case, and it is difficult to conjecture how any other facts which might be made to appear, could alter the effect of these upon the question whether this lake is to be considered a part of Lake Michigan. And though it was admitted by both parties, that "for the

purposes of the trial, Lake Muskegon should be considered as an estuary of Lake Michigan, and part and parcel thereof, and not as a widening or continuation of Muskegon river, I am inclined to consider this rather as the admission of a conclusion of law from the facts, than as a mere admission of facts. Whether this lake is to be considered a part of Lake Michigan or as a widening of Muskegon river (so far as it might be material), would be a question of law to be decided upon the facts of the case, and no admission of the parties could bind the court as to the law. The lake in question might partake of the characteristics of both, and the question would then be which predominates. And upon the assumption that a different rule is to be applied to each—which I do not intend to be understood as admitting—I should be inclined to hold that this lake, so far as its character can have any bearing upon the question of riparian ownership, is to be treated as more properly a widening of the Muskegon river or a separate lake, than as a part of Lake Michigan. The only circumstance which I have been able to discover tending to give it the character of the latter, is the fact that it rises and falls with it. If this fact were sufficient to make it a part of Lake Michigan, then it is difficult to see why every other stream large or small which empties into that lake, should not be considered a part of it, so far up as it is affected by the rise and fall of the lake. The rise and fall of Lake Michigan and the other great lakes of the same chain, is not a tide occurring at regular intervals like that of the ocean, nor does it arise from the same cause. And, though it is probable their waters may be slightly affected by the lunar attraction, and a very minute tide may perhaps be detected by a long and careful course of observation with accurate instruments, yet the court must judicially notice, that it must be too slight to be recognised by ordinary observation, or to serve any practical purpose in determining the extent of riparian ownership. This fact was judicially noticed in *Lorman* vs. *Benson*, 8 Mich. 18. Courts must also be presumed to be so far acquainted with the laws of nature, as to enable them judicially to determine that the rise and fall of these lakes, is governed mainly by the same causes

which affect the rise and fall of the rivers which flow into them, and which rise and fall more than the lakes themselves, and that all the connecting straits between the lakes, such as the straits of St. Mary (or St. Mary's river), the St. Clair and Detroit rivers, must, of necessity, rise and fall with the lakes which they connect. It is a matter of public notoriety, that the waters of Detroit river vary in height at different but irregular periods, to the extent of several feet, from this cause, and quite as much as those of Lake Michigan or Muskegon Lake are shown to vary; yet, we all held in *Lorman* vs. *Benson*, that the common law rule applicable to streams above the ebb and flow of the tide applied to that river, and I have not been able to discover any fact or circumstance in this case, sufficient to make a substantial difference in principle between that case and the present; I am entirely satisfied with the principles established by that case, and think them substantially applicable to the present. Whether the riparian ownership extends to the centre of the lake is a question not involved in this case; the only question being whether it extends to the place where the mill is erected, which is in the shallow water of the lake some twenty-nine or thirty rods from the shore, on ground which is susceptible of beneficial private use and enjoyment as land. The real question is, whether the ownership of section eighteen bordering upon the lake, carries with it the ownership of the *locus in quo*, not whether it extends beyond, or whether its outward limits in the lake can be defined with precise accuracy. But, if the water continues so shallow as to render the lands under it susceptible of beneficial private use to the centre line of this narrow lake, then I have no hesitation in saying I think the riparian ownership extends to such centre line, unless indeed there may be intervening islands, which the government have shown an intention to reserve from the grant of the main land by surveying them as separate tracts, in which case, the riparian ownership would extend only to the centre line between the island and the main land.

If the waters become so deep in approaching the centre of the lake, as to render the land under them incapable of such private

or individual use, the question of ownership beyond where it is available for such purpose becomes as barren as the use itself, and is of no practical importance whatever. But to deny all riparian ownership under the shallow waters because its outward limits in the lake cannot, *a priori*, without reference to the facts of the particular case, be defined with a precision which shall settle all other cases, would be extremely unphilosophical and contrary to the principles and analogies of the law in other cases. There are many classes of cases, especially where the question is between the rights of individuals and those of the public, in which the precise line cannot be drawn by any general rule applicable alike to all cases. But the law does not, therefore, deny the existence of both public and private rights nor either of them; and the courts, admitting the existence of both, seek to determine the question between them upon the facts of the particular cases as they arise. I do not mean to say that the ownership of the tract here in question, or any other tract bordering upon the lake, must necessarily extend into the lake in the direction of the side lines of the tract; this might depend upon the shape of the lake and the relative rights of adjoining owners. But no such question arises here. When the question arises between adjoining owners, it will not be found difficult of decision within the principle of adjudged cases.

But this riparian ownership does not carry with it the right to the exclusive and unrestricted use of the lands ordinarily covered by the water: as in the case of rivers, that use must, in all cases, be subordinate to the paramount public right of navigation, and such other public rights as may be incident thereto,—in other words, all the private or individual use and enjoyment of which the land is susceptible, subordinate to, and consistent with the public right, belong to the riparian owner as against any other person seeking to appropriate it to his individual use.

These principles, when applied to Muskegon Lake, can no more interfere with the public right of navigation than when applied to rivers. In both cases the ownership is equally qualified by and subordinate to the rights of the public. In fact, navigation is

much more likely to be benefited than injured by the application of these principles. Wharves and other similar erections are essential to the interests of navigation; and, if the bed of the lake to high or low water-mark was vested in the state, no private owner could extend a wharf one foot from the water line, without becoming a trespasser and incurring the risk of losing his improvement, though navigation might be aided rather than injured by it; while, by admitting the riparian ownership as above explained, individual enterprise is stimulated to improvement, and the public interest is subserved. The public, through their proper authorities, have always the right to restrain any encroachment which may be injurious to the public right, and to compel the removal of any obstruction or impediment, as well as to punish the offender to the same extent as if the bed of the lake were vested in the state.

I am not aware that the state, or the federal government, has at any time asserted any right or claim to the beds of the lakes more than to those of the rivers, and I think the same principles of riparian ownership apply equally to both. I speak here of the small lakes *within* the states, because the large lakes on our borders are not involved in the present case, though I am not aware that the state or the United States has ever asserted any claim with respect to the one more than the other, and I must frankly admit, that I have not as yet seen any sound reasons for making a distinction, based upon a difference of size between lakes, more than between rivers: *Jones* vs. *Soulard*, 24 Howard 40; nor, because some may be a state or national boundary while others are not. But without expressing any opinion upon the large lakes upon our borders, I think the general understanding and common usage of the country, have as clearly recognised the principles of riparian ownership with reference to the lakes as to the rivers within the state, and that this general understanding and common usage have been constantly acted upon; and, that capital and labor to a very great extent have been expended on the faith of them, cannot admit of a reasonable doubt. To repudiate this common usage at this late day, by creating an

arbitrary distinction which has no foundation in the nature of things, and to recognise in the state or the United States a right of property in the beds of the hundreds of lakes and natural ponds within her limits, would, in my opinion, be an unwarrantable interference with private property and do incalculable mischief.

These lakes and ponds are scattered over almost all parts of the state; they impart to the landscape the charm of picturesque scenery, their banks are often selected as favorite sites for residence, and command a high price; these considerations entered into the original purchase from the government and every subsequent purchase. Much, and, in many cases, most of the value of these locations and the residences upon them, consists in the beauty of the prospect which the lakes afford. But if the land under them belong to the state or the federal government, any man may go into the shallow water a few feet from the shore and erect in front of such dwellings, mills, fishing-houses, or such other buildings as his profit, convenience, or malice may dictate, and thereby destroy the beauty of the prospect and the value of the property, and the owner has no remedy but as one of the public at large. The atttorney-general could not well interpose for the protection of the owner's private interest alone, and the public right would not in general be impaired.

Some of these lakes form no part of a chain of navigable waters, and are not susceptible of public use for purposes of navigation; some of them are entirely enclosed by the lands of a single owner. If the bed of the lake belongs to the state or to the United States in one case, I do not see why it does not equally in others, wherever it has been meandered by the public surveys. Some startling consequences would flow from such a doctrine, which it unnecessary here to notice.

There is much good sense in the observations of the Supreme Court of Ohio in *Gavit's Administrators* vs. *Chambers*, 3 Ohio R. 495, and they have met with the very general assent of the courts, especially in the Western States. And though these observations were applied to a river, they are, I think, equally applicable to the lakes; and if the beds of these lakes are to be treated "as an

appropriated territory, a door is opened to incalculable mischiefs. Intruders upon the common waste would fall into endless broils amongst themselves, and involve the owners of adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects of individual scramble, necessarily leading to violence and outrage."

I am, therefore, well satisfied, that both public and private interests are best subserved by recognising the principles of riparian ownership in respect to the lakes, substantially to the same extent as applied to rivers.

The charge of the court below, applying to Muskegon Lake the law applicable to tide-waters, was erroneous. The judgment must therefore be reversed with costs, and a new trial granted.

MANNING, J.—On the trial, it was admitted that Muskegon Lake is "an arm or estuary of Lake Michigan, and part and parcel thereof." The charge was based upon this admission, and its correctness must be tested by it.

In *Lorman* vs. *Benson*, 8 Mich. 18, the common law rule that gives to the owner of land on a river above tide-water, the bed of the stream to the middle of the stream, was held applicable to the Detroit river, which differs from ordinary rivers, only in that it connects two lakes—St. Clair and Erie—having its origin in one and terminating in the other.

To apply this rule to our large lakes, it seems to me would be absurd. To hold for instance, that a deed of one acre of land, in a square form, bounded on one side by Lake Michigan, conveys as an incident to the grant a strip of land of the same width, extending forty or fifty miles into the lake, with the sole right in the grantee to take fish in the waters covering the same—for the ownership of the bed of a stream carries with it this right, (*Hooker* vs. *Cummings*, 20 Johns. 90; Angell on Watercourses 56)—would be an anomaly so great, that it would only need to be stated to be universally condemned.

It does not follow from this, however, that the owners of land on our lakes, have no greater rights in the lakes than the citizens

of the state at large. Whether they have or not is the present subject of inquiry. As individuals, as citizens of the state, they have not. But there may be rights connected with the land itself, growing out of location, public policy, or having some other origin, to which they may be entitled, and which are not common to the citizens of the state at large, or to persons owning lands not thus situated.

We have no legislation on the subject, and in the absence of all legislation the inquiry is, what are the rights of the citizens of the state in our great lakes? They are the rights of navigation and of fishing. These rights are common to all, whether they own land on the lake-shore or not. At the same time, it must be admitted that the owners of such lands have greater facilities for the enjoyment of these rights than others. In this respect they may be likened to a person residing on a highway, while their fellow-citizens generally may be likened to a person residing at a distance from such highway, and who has no means of approaching it except over the land of another. Both have equal rights to the use of the highway when upon it, but the first, by reason of his residence, has a facility for using it which the other has not.

But the similitude fails, or does not hold good, when we attempt to press it further. The highway spoken of being the work of man, all rights connected with it are artificial or conventional. They have no existence of themselves. Whereas the lakes are the work of our Creator, and our rights to them as highways and fisheries are natural and not artificial rights, and may therefore be said to be self-existent rights. The same may be said of the facilities for their enjoyment peculiar to the owners of the land on the lake-shore. These are also natural and not artificial rights, and, like all natural rights, cannot justly be taken from them by the state unless necessary for the good of the body politic, to which all natural rights must yield. They are natural rights incident to location, and of kin to the right of the owners of such land to the lake breeze, or to the exuberant fertility of the soil, should it prove to be more luxuriant than the soil back from the lake. No one would for a moment think of taking away either

of these rights from the owner of the land. And yet the rights of which we have been speaking are as truly rights as either of these.

If what we have said be correct, a well settled principle of law steps in here to aid the plaintiff in error. It is this, that where the law gives a right, it gives with it all minor rights necessary to its enjoyment. Wharves and piers are almost as necessary to navigation as vessels and ship-yards, or places for the construction of vessels, are indispensable. May not, therefore, the owner of the shore, under this rule, use the adjacent bed of the lake for the construction of ways, for the launching of vessels, or of wharves and piers for vessels to lie at and receive and discharge their cargoes? The right of navigation without such right would be incomplete.

It seems to me on principle, as well as reason, that the owner of the shore has a right to use the adjacent bed of the lake for such purposes. Wharves and piers must be constructed by some one; and by whom if not by the owners of the adjacent shore? No one else can construct them, unless it should be the state or some one under its authority. But has the state that right? Can the owner of the shore be cut off from the lake against his consent, without taking from him those natural rights of which we have spoken?

Without deciding this point, the doubt suggested by it may suffice for the custom which has prevailed so long that it may be considered the settled policy of the state, for the owners of the shore to construct such works and to use the bed of the lake for that purpose. In a government like ours such is undoubtedly the true interest of the state. It stimulates individual enterprise, encroaches on no private right, leaves the public rights of navigation and of fishing unimpaired, and turns to a good account what would only be a profitless monopoly in the hands of the state.

Mills and manufactories, unlike wharves and piers, do not add to the conveniences or usefulness of the lakes as highways or thoroughfares; and yet they seem to me clearly to come within the state policy mentioned. A different policy as to them would

depress rather than encourage enterprise, and render that unproductive which otherwise might be made useful. I am, therefore, of opinion that all such constructions connected and used with the shore pass as an incident or appurtenance of the shore in a con veyance of the latter.

CAMPBELL, J.—I concur entirely in the views of my brother CHRISTIANCY. I think the riparian proprietor is entitled to all the control of the bed of the water which can be exercised without damage to the public interest. His right is proprietary and absolute. And while I think that the particular place in controversy is no part of Lake Michigan, I do not regard the distinction as at all material. Usage as well as reason extends to the one as well as to the other. Navigation in our day cannot do without wharves and similar conveniences for loading and shelter, and instead of being universal nuisances, they are in general indispensable aids to it. The inquiries concerning ownership in deep water, far from shore, can never become practical questions, and it cannot make any difference how they are settled. But wherever use can be and is made of the bed of the water, in improvements near the shore, in waters not governed by the artificial common law rules of tide-water ownership, I think the rules applicable to fresh-water rivers are more reasonable and just, and are certainly more con formable to the common understanding and usage. They preserve all valuable public privileges, and interfere with no rights whatever.

MARTIN, C. J.—I concur fully in the views of my brother CHRISTIANCY. I think the rights of riparian proprietors upon our interior lakes—and I regard Lake Muskegon as such, and not as an arm of Lake Michigan, notwithstanding the stipulation which, although it may be taken for true, I regard as immaterial—are the same as these of proprietors upon our navigable streams. They have the right to construct wharves, buildings, and other improvements in front of their lands, and, so long as the public servitude is not thereby impaired, they are a part of the realty and pass

with it. Certainly no one can occupy for his individual purposes the water front of such riparian proprietor, and the attempt of any person to do so would be a trespass. When, therefore, Ruddiman erected the structure in controversy in the shallow water of the lake, and upon his water front, it was substantially an erection upon his own land, and its use and ownership was dependent upon his ownership of the land to which it was appurtenant. He made it a part of his real estate as much as if it had been an additional story erected upon a building situated upon the soil not covered with water. It was a part of the land; appurtenant to it, and to be enjoyed with it. This *he* cannot deny; nor can any one question it whose soil or possession was not thereby invaded. As between individuals, a wharf and the structures upon it attached to the soil of a riparian proprietor, are as much a part of the real estate as is a building erected upon the land over which the water does not flow; and by a sale of the land they are conveyed. There is no analogy between such title and the right of fishery, and no argument can be drawn from the one to support the other. Each depends upon separate principles of the law.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.[1]

Legacies, Vested and Contingent.—If it be doubtful whether a legacy bequeathed by will is vested or contingent, the law inclines to treat it as vested; and where it is evident from the will, that the testator intended to make an entire disposition of his estate, which intention would be defeated if a legacy given were not vested, it is an influential consideration that the legacy be construed as vested: *Burd's Executor* vs. *Burd's Administrator.*

A legacy is to be deemed vested or contingent, as the time appears to have been annexed to the gift or to the payment of it; if there be a

[1] From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.